

Supreme Court No. 80420-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE
OWNERS ASSOCIATION,

Petitioners.

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SUPREME COURT
STATE OF WASHINGTON

PETITIONERS' MOTION TO STRIKE PORTIONS OF MUTUAL OF
ENUMCLAW INSURANCE COMPANY'S REPLY IN SUPPORT OF
MOTION TO DISMISS

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I. IDENTITY OF MOVING PARTY

Petitioners Villas at Harbour Pointe Owners Association ("Association") and T & G Construction, Inc. ("T & G"), ask for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Under RAP 10.3(c), Petitioners respectfully request an order striking sections 1-3 of Mutual of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss ("Reply") because these sections raise new arguments not set forth in the original motion.

III. FACTS RELEVANT TO MOTION

Respondent Mutual of Enumclaw ("MOE") included a one-paragraph Motion to Dismiss within its 20-page Supplemental Brief. The entirety of the Supplemental Brief related to questions of jurisdiction of the trial court in the construction defect lawsuit, and not jurisdictional questions of this Court to decide this petition. Accordingly, Petitioners filed an Answer that addressed almost exclusively issues of jurisdiction of the court in the construction defect lawsuit.

Mutual of Enumclaw filed a Reply that included a host of new arguments questioning the jurisdiction of this Court to decide this petition.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Under RAP 10.3(c), “A reply brief should be limited to a response to the issues in the brief to which the reply brief is directed.” “An issue raised and argued for the first time in a reply brief is too late to warrant consideration.” *In re Marriage of Sacco*, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990). Granting of a motion to strike is an appropriate remedy for a party’s failure to comply with RAP 10.3(c). *See State v. McAllaster*, 31 Wn. App. 554, 558, 644 P.2d 677 (1981). Here, sections 1-3 of MOE’s reply brief should be stricken because these sections raise new arguments which were not raised in the original motion.

In its Motion to Dismiss, MOE commenced its argument with the statement, “As outlined above, *the court in the Construction case* did not have jurisdiction to render a judgment against T & G.” MOE’s Motion at p. 20 (emphasis added). It is assumed that the phrase “[a]s outlined above” was meant to incorporate the preceding sections of MOE’s Supplemental Brief (pages 1-19) into its Motion to Dismiss. If so, a review of each of the arguments in the Supplemental Brief shows these arguments addressed issues of jurisdiction of the trial court in the construction defect lawsuit. Highlight of the argument headings confirms this contention:

- I. Supplemental Statement of Issues
- II. The Association's Failure to Petition for Review on the Issue of T&G's Violation of Policy Conditions Requires the Court to Affirm the Court of Appeal's Vacation of the Judgment Against Mutual of Enumclaw, and Remand this Case.
- III. The Judgment Rendered **in the Construction Suit** is Subject to Collateral Attack for Voidness. (emphasis added)

MOE did not argue anywhere in the 19 pages of the Supplemental Brief that preceded MOE's Motion to Dismiss that *this* Court lacked jurisdiction to rule on *this* petition. As reflected in the Association's Answer, essentially the entire briefing in MOE's Supplemental Brief went to questions of jurisdiction of the trial court in the construction defect lawsuit to enter judgment against T&G, a completely separate issue than questioning the jurisdiction of this Court.

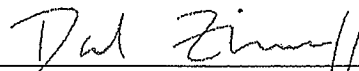
Following the introductory sentence of its motion, MOE continued in the next four sentences to allege why *the trial court in the wholly-separate lawsuit* lacked jurisdiction. It was not until the fifth and final sentence of the motion that MOE claimed this Court lacked "jurisdiction." Thus, via the four corners of its motion (including Supplemental Brief), the only basis for arguing "this Court lacks jurisdiction to continue" is in the final sentence of MOE's motion.

All of the arguments contained within sections 1-3 of MOE's Reply are newly alleged and should have been raised in the original motion. Because these arguments were not raised in the original motion, and since the Association did not have an opportunity to address these new arguments, under RAP 10.3(c) this Court should strike sections 1-3 of Mutual of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss.

Respectfully submitted this 19th day of May, 2008.

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**FILED AS ATTACHMENT
TO EMAIL**


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